MALAYAN BANKING BHD v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-69-09-2015]
17 OCTOBER 2016

CIVIL PROCEDURE: *Judicial review – Certiorari – Application to quash award by Industrial Court – Employment on fixed term contract inclusive of probationary period – Employee not confirmed by employer – Industrial Court awarded back wages of 12 months with rescaling of 20% for post-dismissal earnings – Whether employee terminated with just cause and excuse – Whether award appropriate – Whether there was reviewable error by Industrial Court*

LABOUR LAW: *Employment – Dismissal – Employee employed on fixed term contract inclusive of probationary period – Employee not confirmed by employer due to incompetency – Whether employee dismissed with just cause and excuse – Whether probationer on fixed term contract entitled to back wages of unexpired portion of fixed term contract – Whether entitled to 12 months back wages – Discretion of Industrial Court in rescaling percentage for post-dismissal earnings – Industrial Relations Act 1967*

The second respondent was employed by the applicant on a fixed term contract for one year, commencing from 18 January 2010. The one year contract entailed a probationary period of not less than six months inclusive of three months of training and courses. The second respondent started selling the assigned applicant's products from April 2010 till June 2010 but her position was still not confirmed by the applicant on 30 July 2010. The second respondent's fixed term contract would have expired on 17 January 2011 and there was five months and two weeks left for her contract to expire. Dissatisfied with the applicant's decision not to confirm her, the second respondent filed a representation pursuant to s. 20(1) of the Industrial Relations Act 1967 ('the Act') culminating with the first respondent adjudicating her case. The first respondent held that the second respondent was terminated without just cause and excuse and awarded back wages of 12 months with a rescaling of 20% for post-dismissal earnings ('the award'). In the present application, the applicant applied for an order of *certiorari* to quash the first respondent's award. The applicant submitted that, *inter alia*, since the second respondent failed to perform despite being given counselling and warnings, her non-confirmation was with just cause or excuse. The issues that arose for the court's adjudication were (i) whether the first respondent had correctly found that the second respondent had been dismissed with just cause and excuse; (ii) whether the second respondent, as a probationer on a fixed term contract, was only entitled to back wages of the unexpired portion

of her fixed term contract or 12 months back wages pursuant to Second Schedule to the Act; and (iii) whether the first respondent was correct in only rescaling 20% from the back wages in light of proof of post dismissal earnings.

Held (allowing application in part):

(1) The first respondent justifiably found there to be no cogent evidence regarding the allegation of incompetency of the second respondent and no guidance or ample opportunity to improve her performance. These findings were findings of fact by the first respondent which ought not to be lightly interfered with save for good reason of which none existed. (para 34)

(2) The first respondent had committed a reviewable error when it awarded back wages in line with that of a probationer in accordance with the Second Schedule of the Act. Although the second respondent was placed on probation, her entitlement to back wages upon being unfairly dismissed had to be limited to the unexpired term of her fixed term contract. Any other construction would render the whole intent and purpose of having a fixed term contract meaningless. Therefore, the second respondent was only entitled to back wages limited to the unexpired duration of her fixed term contract which was 1 August 2010 to 17 January 2011, a period of five months and two weeks. (paras 54, 55 & 62)

(3) The Second Schedule to the Act provides that where there is post-dismissal earnings, a percentage of such earnings, to be decided by the court, shall be deducted from the back wages given. However, such a discretion is in the nature of decision-making process and subject to correction upon judicial review. The first respondent ought to have adopted a more liberal figure. The post dismissal earning of the second respondent was almost three times her salary before she was dismissed *albeit* only after a period of about eight months. A rescaling of 40% would have been more appropriate. (paras 56, 61 & 62)

Case(s) referred to:

Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeal [2014] 1 LNS 686 CA ***(refd)***

Azmi & Company Sdn Bhd v. Firdaus Musa [2000] 2 ILR 510 ***(refd)***

Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent [1985] AC 374 ***(refd)***

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541 FC ***(refd)***

Hartalega Sdn Bhd v. Shamsul Hisham Mohd Aini [2004] 3 CLJ 257 HC ***(refd)***

IE Project Sdn Bhd v. Tan Lee Seng [1987] 1 ILR 165 ***(refd)***

Khaliah Abbas v. Pesaka Capital Corp Sdn Bhd [1997] 3 CLJ 827 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Royal Selangor Yacht Club v. Jeyasingam Joseph Joseph Fernandez [2007] 2 LNS 2378 ***(refd)***

Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC ***(refd)***

Thangasamy Brown DN Gnanayutham v. Pelabuhan Tanjung Pelepas Sdn Bhd & Anor [2009] 6 CLJ 144 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

Other source(s) referred to:
The Malaysian Employment Laws, Vol 1 MN D'Cruz Marsden Law Book, 2008, pp 100, 101

For the applicant - Edwin Rajasooria & Abdul Jalil Mohamad; M/s Kamil Hashim Raj & Lim

For the 2nd respondent - R Palaniappan; M/s Palani

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This is the applicant's application for *certiorari* to quash the whole of the first respondent's award in finding a case of unfair dismissal and in awarding back wages of 12 months with a reduction of 20% for post dismissal earnings to the second respondent.

[2] Among the issues raised in this application was the rather novel question of whether an employee who is employed both as a probationer and on a fixed term contract and who is held to have been terminated without just cause or excuse before the expiry thereof, is only entitled to back wages of the unexpired portion of the fixed term contract or 12 months back wages pursuant to the Second Schedule to the Industrial Relations Act 1967.

Background Facts

[3] The second respondent was employed as a Financial Executive on a fixed term contract for one year commencing from 18 January 2010 with the applicant. The one year contract also entailed a probationary period of not less than six months inclusive of three months of training and attending courses to enhance the second respondent's skills as a Financial Executive.

[4] The second respondent commenced selling the assigned applicant/ bank's products from April 2010 till June 2010. The second respondent was not confirmed in her position as Financial Executive with the applicant on 30 July 2010.

[5] The second respondent's fixed term contract would have expired on 17 January 2011 and there was exactly five months and 17 days left for her contract to expire.

[6] Dissatisfied with the appellant's decision not to confirm her, the second respondent filed a representation pursuant to s. 20(1) Industrial Relations Act 1967 culminating with the first respondent pursuant to a Ministerial reference under s. 20(3) of the same act, adjudicating her case.

[7] After hearing the case, the first respondent held that the second respondent was terminated without just cause and excuse and awarded back wages of 12 months, with a rescaling of 20% for post dismissal earnings.

Parties Contentions

Applicant

[8] The applicant submitted that they employed the second respondent because she had experience in the banking industry as she had previously worked at CIMB Bank Berhad performing work of an almost similar nature.

[9] The second respondent commenced selling the assigned applicant/bank's products from April 2010 till June 2010. The second respondent's immediate superior who supervised her, gave evidence at the Industrial Court that he had counselled and also warned the second respondent to "buck up". Because her sales performance for the months of April, May and June 2010 were dismal, the second respondent was not confirmed in her position as Financial Executive with the applicant on 30 July 2010.

[10] It is the applicant's case that because the second respondent had failed to perform despite being given counselling and warnings, her non-confirmation was with just cause or excuse.

[11] As the second respondent's fixed term contract would have expired in any event on 17 January 2011, there was exactly five months and seventeen days left for her contract to expire.

[12] The applicant submitted that it is a settled rule of Industrial jurisprudence that a probationer has no substantive right of tenure to hold the position nor does she hold a lien upon the post beyond the agreed contractual probationary period.

[13] The applicant submitted that the first respondent committed an error or exceeded its jurisdiction or its decision was so unreasonable when it awarded the full back wages for 12 months to a probationer and failed to take into account that the second respondent was on a fixed term contract employment and the remaining balance contract period was five months and two weeks.

[14] The applicant further submitted that the first respondent committed an error in law and its decision was so unreasonable, when it merely deducted 20% of the back wages when it was proven that the second respondent had obtained post dismissal earnings of between RM6,000 to RM7,000 per month which was three times higher than the salary she earned during her employment with the applicant.

[15] It was also contended that the first respondent committed an error in law or exceeded its jurisdiction when it concluded that the second respondent had been dismissed by the applicant because she was pregnant when this was not the second respondent's pleaded case and was raised for the first time during the trial.

[16] The applicant submitted that the first respondent committed an error in law and/or exceeded its jurisdiction when it held that the applicant had failed to prove the second respondent's poor work performance or in failing to find that the second respondent had failed to meet her set sales target, contrary to the evidence produced at the trial.

[17] It was finally submitted that the first respondent committed an error in law or made an unreasonable decision when it asked the wrong question in finding that the applicant had failed to warn or advise the second respondent, when at the material time the second respondent was a mid-career executive who had previous working experience having held a similar position at CIMB.

Second Respondent

[18] The second respondent by way of reply submitted that although it was the assessment of the first respondent that the applicant's termination letter dated 26 July 2010 did not disclose the reasons for termination, the first respondent was well aware of its duty and went on to consider the evidence produced in court to determine whether the excuse or reason advanced by the applicant ie, non-performance, had been made out.

[19] It was the assessment of the first respondent that the applicant's witness COW1, who was the second respondent's immediate supervisor, agreed during cross-examination that he did not issue any warning letter to the second respondent regarding her poor performance or advise the second respondent in respect thereof.

[20] The first respondent had found as a fact that there was no evidence at all in respect of notification of short coming in performance, guidance and ample opportunity provided to the second respondent to improve her performance. It was submitted that it was also a finding of fact by the first respondent that the applicant did not issue any warning letter to the second respondent in respect of her inability to achieve sales target set by her superiors. The first respondent also held that the applicant did not counsel the second respondent regarding the work performance issue and the sales target.

[21] The first respondent, it was further submitted, was correct in making a finding that it is the duty of the applicant to come out with a reason for the second respondent's cessation of service and this was not shown to the satisfaction of the court.

[22] The first respondent was also correct in making a finding that the applicant had failed to provide cogent and convincing evidence regarding the second respondent's incompetency, which was a requirement in industrial jurisprudence.

[23] The second respondent also submitted that it was clear that the finding of unfair dismissal made was based on the failure of the applicant to prove the second respondent's incompetency. It was clearly based upon the work performance issue as raised by the applicant, which the applicant had failed to prove. A mere passing remark on the pregnancy of the second respondent does not automatically warrant the whole award to be quashed when the ultimate decision itself is correct.

[24] The decision of the first respondent was reasonable and there were no errors of law warranting this court's intervention by way of judicial review.

Grounds For Judicial Review

[25] It has been now been commonly accepted that the grounds for judicial review in summary are as follows:

(i) Illegality – that the decision maker had failed to keep strictly within the perimeters of his powers;

(ii) Irrationality or "*Wednesbury* unreasonableness" – that the decision was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; and

(iii) Procedural impropriety – that the decision maker failed to observe basic rules of natural justice and or procedural rules.

[26] See *Council of Civil Service Unions and Others Appellants v. Minister for the Civil Service Respondent* [1985] AC 374 and *Ambank (M) Berhad v. Menteri Sumber Manusia & Anor And Other Appeal* [2014] 1 LNS 686.

[27] Over the course of time the principle of proportionality has also been added to the above categories thus widening the scope of judicial intervention of administrative action by way of judicial review.

[28] In *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200; [2009] 4 MLJ 285, the principles governing judicial review was neatly encapsulated as follows:

> The first principle of judicial review concerned the decision making process and not the merits, substance or justification. The second principle is that there can be an exception to the first principle where the court could examine the substance or justification to satisfy itself that the decision maker had not transgressed the principles of procedural impropriety, illegality or irrationality.

[29] The boundaries however, that traditionally distinguished review for process and that of substance have been removed. The courts are now therefore more inclined to review for substance as well in an appropriate case where the situation so requires. See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; [1997] 1 AMR 433, and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

Analysis And Findings

[30] From a consideration of submissions advanced by parties, the issues that arise for consideration and determination are as follows:

i) Whether the first respondent had correctly found that the second respondent had been dismissed for just cause and excuse?;

ii) If so, whether the second respondent who was employed both as a probationer and on a fixed term contract was only entitled to back wages of the unexpired portion of her fixed term contract or 12 months back wages pursuant to the Second Schedule to the Industrial Relations Act 1967?; and

iii) Whether the first respondent was correct in only rescaling 20% from the back wages in light of proof of post dismissal earnings?

Whether The First Respondent Had Correctly Found That The Second Respondent Had Been Dismissed For Just Cause And Excuse?

[31] It is not in dispute on the evidence adduced before the first respondent that there were no written warning letters issued to the second respondent in respect of her work performance. There was also no letter issued to the second respondent to advise her on her expected sales target.

In the case of *IE Project Sdn Bhd v. Tan Lee Seng* [1987] 1 ILR 165, it was held:

> Dismissal for unsatisfactory work or incompetency should almost invariably have been preceded by warnings.
>
> In the event of poor performance being the reason for the dismissal one should always endeavour to show that the work complained of was performed subsequent to the warnings.

[32] This prerequisite before an employee is terminated on grounds of poor performance has stood the test of time. It is premised upon the rule of fairness that a workman must be first alerted to the alleged poor performance on his or her part and that he or she must be then accorded sufficient opportunity to improve. It is only after despite this, the workman still fails to sufficiently improve his or her performance that the employer is then justified in taking such a drastic course of action in dismissing the workman on those grounds.

[33] Although the requirement to give written warnings and to accord employees with sufficient opportunity to improve is not an inflexible rule, it is essentially a matter to be determined on the facts of each case. On the facts here, the learned chairman of the first respondent had found that there were no such written warnings issued in respect of the second respondent's performance.

[34] As a result, the first respondent justifiably found there to be no cogent evidence regarding the allegation of incompetency on the part of the second respondent and no guidance or ample opportunity to improve her performance. These findings were findings of fact made by the first respondent which ought not to be lightly interfered with save for good reason of which none exists.

[35] Although the learned chairman of the first respondent had alluded to dismissal on ground of pregnancy, in his ultimate conclusion, he had clearly and unequivocally found from the evidence that there was lack of cogent and convincing evidence regarding the second respondent's alleged incompetency.

[36] I therefore find no error on the part of the first respondent on this issue.

Whether The Second Respondent Who Was Employed Both As A Probationer And On A Fixed Term Contract Was Only Entitled To Back Wages Of The Unexpired Portion Of Her Fixed Term Contract Or 12 Months Back Wages Pursuant To The Second Schedule To The Industrial Relations Act 1967?

[37] In the normal situation, an employee is usually either a probationer or one employed upon a fixed term contract. This is an unusual case where the second respondent was both a probationer and employed on a fixed term contract of one year. In this sense, this situation is rather novel. I was informed by learned counsel for the applicant that this is apparently the practice currently adopted in the banking industry.

[38] Although this matter was not raised before the first respondent, the matter being essentially one of law, this does not preclude the applicant from raising this issue at this stage. This court will therefore proceed to determine the issue raised.

[39] Before proceeding further, it is apposite to state the current position with regard to an employee on probation and an employee who is employed on a fixed term contract.

[40] In respect of an employee employed on probation whose employment is terminated without just cause or excuse, the Second Schedule to the IRA states:

Factors For Consideration In Making An Award In Relation To A Reference Under Subsection 20(3)

[Subsection 30(6a)]

2. In the case of a probationer who has been dismissed without just cause or excuse, any back wages given shall not exceed twelve months' back wages from the date of dismissal based on his last-drawn salary

[41] The maximum back wages that an employee who has been unlawfully dismissed is entitled to therefore is 12 months back wages.

[42] The position of a probationer has been explained as follows in "*The Malaysian Employment Laws* Vol. 1 M.N. D'Cruz Marsden Law Book, 2008" pp. 100 & 101:

it is well settled law that at the end of the probationary period it is open to the employer to continue the employee in his service or not is his discretion, otherwise the distinction between probationary period and permanent employment will be wiped out. Even if on the expiry of the probationary period the work of the employee is satisfactory, it does not confer any right on them to be confirmed.

[43] The above position was reaffirmed in *Hartalega Sdn Bhd v. Shamsul Hisham Mohd Aini* [2004] 3 CLJ 257; [2004] 3 MLJ 117 when referring to the case of *Khaliah bte Abbas v. Pesaka Capital Corp Sdn Bhd* [1997] 3 CLJ 827; [1997] 1 MLJ 376, as follows:

… merely bringing the probationer within the ambit of s. 20 of the Industrial Relations Act, 1967 ("IRA") does not automatically imply that the probationer is elevated to the status of a confirmed employee as this was not the intention of the legislature

The court later observed,"… it was conditional for a probationer to perform his functions to the satisfaction of his employer. Failure to do so would render the probationer liable to be dismissed, save that such a decision must not be capricious or arbitrary".

[44] In *Azmi & Company Sdn Bhd v. Firdaus Musa* [2000] 2 ILR 510, the Industrial Court held:

If the employer is reasonably satisfied that an employee is not suitable for the job he may be removed. Thus the test would be whether the probationer possess the right skill, competence, temperament, aptitude and suitability which will entitle him to transcend from being an employee on probation to that of a confirmed employee.

[45] The whole idea therefore of placing an employee on probation is in order to assess the aptitude and suitability of the employee for the position. The employer is entitled at the end of the probation period to intimate to the employee that he or she is unsuited for the post and thus they will have to part ways. Any other construction would render the whole concept and purpose of placing an employee on probation otiose.

[46] In respect of an employee or a workman employed on a fixed term contract, the case of *Thangasamy Brown DN Gnanayutham v. Pelabuhan Tanjung Pelepas Sdn Bhd & Anor* [2009] 6 CLJ 144, held *inter alia* as follows:

> The Industrial Court's decision on the issue of fix term contract was consistent with established principles of law. Having found that the appellant was engaged for a fixed term period of six months and the contract terminating by effluxion of time, there was no question of reinstatement but only compensation to be considered by the Industrial Court for the premature termination arising from the constructive dismissal. In the circumstances, **the Industrial Court correctly awarded compensation consisting of the remuneration the appellant would have earned for the balance sum of the contract** together with an exemplary award, equivalent to three months' remuneration for the victimisation that had led to his resignation. (emphasis added)

[47] The Second Schedule was inserted after the case of *Thangasamy Brown (supra)* was decided. A related question is whether the enactment of the Second Schedule has rendered the decision in *Thangasamy Brown* of no effect and irrelevant in determining the question of back wages due to an employee engaged on probation but on a fixed term contract.

[48] The issue for determination now is whether the second respondent should be treated as a probationer or one employed upon a fixed term contract for the purpose of back wages. If the former, then she would, in line with the Second Schedule to the IRA be entitled to a maximum of 12 months back wages which was what she had been awarded, but if the latter, then she would only be entitled to back wages for the remaining balance contract period of five months and two weeks.

[49] In respect of a fixed term contract, although there appears to no superior court decision on the point, the Industrial Court in the case of *Royal Selangor Yacht Club v. Jeyasingam Joseph* (Award No. 2378 of 2007), in determining whether a contract of employment was a genuine fixed term contract, held *inter alia* that the test for determining whether a contract is a fixed term contract is that it must be for a specific period and with a defined beginning and end.

[50] Although the issue for determination was whether there was a genuine fixed term contract or otherwise, this case affords useful guidance as there was also in place a probation clause of three months. The court there held:

> In this context, that a confirmed employee simply means that an employee has passed his probationary period with performance to the satisfaction of the employer and he has thereby been confirmed in his appointment; it does not necessarily mean that by being a confirmed employee, he is a permanent employee. He can be so, though, if and provided that his contract of employment is not a fixed term contract but if it is a fixed term contract, he is still subject to the fixed term.

[51] The position stated above makes absolute sense and has to represent the correct position in law as otherwise, there would simply be no distinction between a permanent employee and one who is employed on a fixed term duration. Whether the employer subsequently chooses to extend the fixed term duration after the initial period and thereafter is another matter for then the issue will be whether due to subsequent and frequent extensions, it is still to be construed as a fixed term contract or has been converted to one of permanency.

[52] From the principles espoused above, it is therefore clear that just because an employee is both a probationer and on a fixed term contract, does not alter the basic premise that he or she is still employed on a fixed term for a finite duration. At the end of the contractual period, the employer is well entitled to take the position that he wishes the employment relationship to come to an end in accordance with the expressed term in the contract of employment. In such an event, the employee has no recourse against the employer.

[53] Reverting to the facts of the instant case, although the second respondent was both on probation as well as on a fixed term contract, this did not alter or change the nature of the contract from being that of a fixed term contract. Assuming the second respondent was not terminated and had in fact successfully passed her probationary period, she still would at the end of the one year period have to leave the employment of the applicant in the absence of any extension of the contract.

[54] Therefore although the second respondent was also placed on probation, her entitlement to back wages upon being unfairly dismissed has to be limited to the unexpired term of her fixed term contract. Any other construction would render the whole intent and purpose of having a fixed term contract meaningless. In light of this, I find that the case of *Thangasamy Brown* is still relevant in determining the issue of back wages due to an employee employed on a fixed term contract who has been unfairly dismissed before the expiration of the said fixed term.

[55] The first respondent had therefore committed a reviewable error when it awarded back wages in line with that of a probationer in accordance with the Second Schedule to the IRA.

Whether The First Respondent Was Correct In Only Rescaling 20% From The Back Wages In Light Of Proof Of Post Dismissal Earnings?

[56] The Second Schedule to the IRA in relation to matters the Industrial Court has to have regard to when making an award, reads:

> 3. Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the back wages given.

[57] The above is a statutory enactment of the principle derived from the Federal Court case of *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541; [2001] 3 MLJ 529, which held *inter alia*:

> It is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision making process. As such, it was subject to judicial review

[58] It will be noted that no mathematical formula or otherwise for the rescaling exercise was prescribed both in the said case as well as in the Second Schedule. Thus it is left to the discretion of the presiding tribunal to determine the quantum to be taken into account.

[59] However, in the case decided by the apex court above, such a discretion was held to be in the nature of a decision-making process and therefore subject to correction upon judicial review.

[60] The first respondent had made a finding of fact that after her dismissal the second respondent earned between RM6,000 to RM7,000 per month. Although the second respondent had lost her employment at the end of July 2010 and had no earnings for about eight months, thereafter, the post dismissal earnings of between RM6,000 to RM7,000 was at least three times her salary of RM2,000 which she earned from the applicant. The first respondent had not given any reasons for rescaling only 20% of the amount awarded.

[61] Given the fact that there was evidence that the post dismissal earning of the second respondent was almost three times her salary before she was dismissed *albeit* only after a period of about eight months, the first respondent ought to have adopted a more liberal figure for rescaling. Under all the circumstances, this court finds that a rescaling of 40% would have been more appropriate.

[62] For the reasons given above therefore, I allow the applicant's application for judicial review in part only, as follows:

a) The second respondent is only entitled to back wages limited to the unexpired duration of her fixed term contract which is from 1 August 2010 to 17 January 2011, a period of five months and two weeks; and

b) Rescaling of back wages of 40%.